No. 20553

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DE PINTO,
Appellant,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,
Appellees.

Petition of Appellant, Angus J. De Pinto, and Intervenor-Appellant, James P. Donohue, for Rehearing

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COME NOW, ANGUS J. DE PINTO, appellant, and intervenor-appellant, JAMES P. DONOHUE, and, pursuant to Rule 23 of the Rules of this Court, respectfully petition for a rehearing of this cause, and request that, upon such rehearing, the judgment of this Court shall be modified as follows:

A. Trial Judge Disqualified.

The judgment of the lower Court should be reversed and the cause remanded with instructions to grant a new trial before a United States District Judge, other than the Honorable George H. Boldt. In its opinion, this Court ignored the fact that when DePinto filed an Affidavit of Bias or Prejudice against Judge Boldt, on or about November 20, 1964, pursuant to 28 U.S.C.A. § 144, Judge Boldt was thereby deprived of all power and authority to proceed in this action. The cases cited by appellants at pages 58 to 66 of their Opening Brief fully support this position. DePinto was deprived of a fair trial as guaranteed by the Fifth Amendment to the Constitution of the United States.

B. Judgment Excessive.

The cause should be remanded to the lower Court with instructions to reduce the judgment in one or more of the following respects:

(1) The judgment should be reduced to 57½% of $314,794.19, namely $180,856. This Court, in considering the issue with respect to the cancellation of 42½% of the common stock of United, formerly held by American Security and the Duhames, stated that, "While DePinto has cited a number of decisions in support of his position on this branch of the case, we do not find them persuasive under the special circumstances of this case." This Court erred in assuming that there are "special circumstances" which make well-settled law inapplicable here. Under the terms of the merger agreement, Provident is prosecuting this action as a trustee for former United stockholders and can have no right of recovery greater than that enjoyed by the stockholders for whom the action is maintained. Such stockholders, if they sued in their own right, would not be entitled to

recover attorneys' fees and would not be entitled to damages in excess of 57½% of the value of the assets transferred from United to American.

(2) The judgment should be reduced by the sum of $100,000, paid by the Duhames as consideration for a covenant not to sue. As this is a diversity action, the lower Court was required to recognize and apply the settled law of the State of Arizona, namely that a payment made to a plaintiff by one joint tort-feasor must be credited upon any judgment rendered against another joint tort-feasor in an action instituted against both of them. There is no legal principle, recognized by the Courts of Arizona, or any other state, which permits the plaintiff, or the Court, to "allocate" the payment to any one or more "claims" against the joint tort-feasors, when such payment is made on account of a release or a covenant not to sue with respect to all "claims". Furthermore, in the case at Bar, there was only one claim against DePinto and Duhame for breach of their fiduciary duties as directors of United. The damages flowing from such breach of duty constitute but one "claim". And, further, if the demands for $177,863.84, and $60,695.60, injected into the pretrial order, may be treated as "separate claims", it is, nevertheless, clear that they had long since ceased to exist as viable claims for the reasons that:

(a) such claims were not revived or pursued "within a reasonable time" as provided in the judgment of this Court in *Niesz v. Gorsuch,* 295 F.2d 909 (9th Cir. 1961);

(b) any "claims" other than for $314,794.19 were long since barred by limitations when the Trial Court attempted to inject claims of $177,863.84 and $60,695.60 into the pretrial order; and

(c) the promissory notes and accrued interest of $87,626.88, referred to in footnote 7 at page 16 of this Court's Opinion, and which was included in the judgment

of $314,794.19, represented money loaned by United to United Finance Corporation, and which was included in the alleged claim of $177,863.84.

(3) The judgment should be reduced to not more than the sum of $308,000, for the reason that, by agreement between plaintiff and defendants Kelly, Dunn and Jenkins, said defendants were released of all liability in excess of $308,000. By its Opinion, this Court disregarded the fact that, under the law of the State of Arizona, the release of one joint tort-feasor releases all.

C. Further Proceedings Required.

This Court has rejected DePinto's contentions with respect to the surrender and cancellation of 42½% of United's stock because of its view that the remaining stockholders might not, as a result thereof, be "unjustly enriched". This Court completely overlooks the fact that, to the extent of the value of such stock, the liability of all defendants herein was reduced *pro tanto*.

Upon remand, the Trial Court should be directed to retain jurisdiction of this cause, and upon satisfaction of the judgment by DePinto, a determination should be made of the portion thereof (including the $100,000 payment by the Duhames) which is available for distribution to the former stockholders of United under the terms of the merger agreement. The Trial Court should be further directed to require Provident to pay over to DePinto 42½% of that sum. As hereinabove noted, it is the law of the State of Arizona that a joint tort-feasor is entitled to credit for any sums paid by another joint tort-feasor on account of his joint liability. The 42½% of the stock of United, which has been cancelled, can be worth no less than the sums which would otherwise have been payable, from the net proceeds of the judgment herein (including the $100,000 payment by the Duhames) to the holders of such stock, had the same not been surrendered and cancelled.

It is suggested that this Petition be referred to, and determined by, this Court *en banc*.

Respectfully submitted,

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JOSEPH S. JENCKES, JR., one of the attorneys for appellant Angus J. DePinto hereby certifies that, in his judgment, the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

JOSEPH S. JENCKES, JR.